IN THE HIGH COURT OF GUJARAT AT AHMEDABAD.

CIVIL REVISION APPLICATION No 908 of 1999

For Approval and Signature :

Hon'ble MR. JUSTICE S.K.KESHOTE

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1. Whether Reporters of Local Papers may be allowed to see the Judgment ?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the Judgment ?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

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VERSUS

RAJKUMAR RATANLAL MORARKA

Appearance:

MR NV ANJARIA for the Petitioner

MR CH VORA for the Respondent

CORAM : MR JUSTICE S.K. KESHOTE

Date of Decision : 30/12/1999

C.A.V. JUDGMENT

1. The petitioner - defendant in the special civil suit No. 47 of 1995 (Old No. 112 of 1988) in the court of Civil Judge (S.D.), at Gandhidham, Kutch by this

civil revision application challenges the order of the learned trial court dated 31-3-1995 below Ex.107 under which the application filed by plaintiff - respondent was treated to be an application under section 20 of the Arbitration Act, 1940 and Shri D.K. Verma, Advocate, Supreme Court of India, New Delhi was appointed as an Arbitrator so as to resolve the matter in dispute. Suitably the earlier order of staying the suit under section 34 of the Act, 1940 was modified.

2. The facts of the case, in brief, are that the plaintiff- respondent instituted the suit Ex.1 against the defendant- petitioner for recovery of Rs.2,70,534/with interest. Other reliefs of declaration and injunction have also been prayed for. On receipt of summons of the suit, the defendant - petitioner filed Ex.16 under section 34 of the Arbitration ACt, 1940 and prayed therein for stay of the suit till the Arbitrator resolves the dispute. This order staying the suit was came to be passed by the trial court on 28th June, 1995. The plaintiff petitioner has not challenged that order, meaning thereby, he has also accepted to refer the matter for adjudication to the Arbitrator. It is not in dispute that under the order aforesaid, the trial court stayed the entire suit. However, the trial court at that time has not given any direction to the parties in the order that they may apply under section 20 of the Arbitration Act as per the terms of the contract. None of the parties has taken step to appoint any Arbitrator and the suit for the stay of the same under section 34 of the Arbitration Act, 1940 could have proceeded also. Similarly, for want of Arbitrator to be appointed by either of the parties, or the court, the Arbitration proceedings were also not there. The application at Ex.107 came to be filed by the plaintiff- respondent in the trial court on 24th February, 1998 praying therein for appointment of Mr. D.K. Verma, Advocate, Supreme Court of India, as Arbitrator to decide the matter in dispute. Further direction were prayed for that the case papers be sent to so-named person and he be required to submit report within four months. This application was contested by the defendant - petitioner inter-alia on the ground that such an application is incompetent in law. That the suit proceedings have been stayed and the plaintiff could not approbate and reprobate. It is further contended that the Act of 1940 was repealed and new Arbitration Act came into force and the court is divested of jurisdiction. Under the impugned order, this application came to be allowed. Hence, this revision application before this court.

3. Shri N.V. Anjaria, learned counsel for the defendant- petitioner contended that it is true that the suit filed by the plaintiff- respondent has been stayed on the application of the defendant - petitioner under section 34 of the Arbitration act, 1940 but the plaintiff- respondent has not prayed for the appointment of any Arbitrator and now at this stage he cannot file such an application. It has next been contended that the proceedings under section 20 of the Arbitration Act, 1940 are independent proceedings. The application Ex.107 could not have been moved in the suit which was stayed on the petitioner's application. The Act, 1940 stood repealed and now the new Act has come into force and as a result of which the court has lost the jurisdiction in the matter. No recourse could have been made to provisions of old Arbitration Act after 26th January, 1996. Remedy is only available to the plaintiff under the new Act. Lastly it is contended that the provisions of section 20 of the Arbitration Act, 1940 could not have been invoked by the learned trial court in the facts of this case. The approach of the learned trial court that the application under section 34 of the Act, 1940 was of 1988, the provisions of old Act are applicable to this case is not correct. Summing up his contentions, it is contended that the arbitration proceedings were not started earlier to coming into force of new Act. In support of his contention, he made reference to the provisions of old Act and new Act as well as placed reliance on the decision of the Karnataka High Court in the case of M.A. Narayana Murthy vs. K.N. Navneeth Guptha reported in AIR 1999 KARNATKA 224

4. Shri Vora learned counsel for the respondent supported the decision of the learned trial court.

5. Each case has to be decided on its own facts. The conduct of the parties in the court is very relevant and important. A litigant can not be permitted to approbate and reprobate but if we go by the facts of this case, it is no more in dispute that the defendant petitioner has admitted that the parties agreed to resolve their dispute by arbitration. It is clearly borne out from the fact that in the suit filed by the plaintiff respondent for recovery of Rs.2,71,534/= stay of the proceedings thereof was prayed for under section 34 of the Arbitration Act, 1940 against the defendant petitioner. The learned trial court has considered this application and under its order dated 28th June, 1995 granted the application and the proceedings of the suit of the plaintiff respondent were in toto stayed. The

operative part of the court's order, reads as under:

(i) The defendant's application is hereby granted.

(ii) This suit is stayed till the arbitrator resolves the dispute.

6. It is true that at that point of time, the learned trial court has not appointed the Arbitrator and thereafter also none of the parties to the suit has made any effort to appoint the Arbitrator and get the matter resolved through the Arbitrator. So far as the defendant - petitioner is concerned as the proceedings of the civil suit are stayed why he should bother for all these things and rightly so as it goes in his favour but the plaintiff though concerned person and also affected, for the reasons best known to it has also kept total silence in the matter. This order under section 34 of the Act has been passed on 29th June, 1995 and for a long period of four years, the plaintiff - respondent has also kept silence. Then he has filed this application Ex.107 wherein prayer has been made that the advocate named therein of the Supreme Court may be appointed as Arbitrator so as to resolve the matter in dispute. This application has been opposed on manifold grounds. It is true that this application has been filed after coming into force of the new Act but it is also equally true that the defendant - petitioner himself was desirous of getting this dispute resolved by Arbitrator which he made it clear by filing application Ex. 34 of the Arbitration Act, 1940. The court found favoured with this application and the proceedings were stayed but the court as well as the plaintiff has not taken care of the matter and at the same time appropriate order has not been passed for appointment of an Arbitrator. It is a case where the court has also committed a mistake and it is well settled law that for the mistake of the court, the parties should not suffer. In the meanwhile the old ACt has been repealed and new ACt has come into force but the Court can not be oblivious of the fact that the proceedings of the civil suit remained stayed for all these years and the court has acted very reasonably, fairly and in furtherance of advancing substantial justice to the parties to treat it to be an application under section 20 of the old Act. The insistence of the defendant petitioner for not proceeding in the suit clearly speaks for its conduct. The suit will take a long time meaning thereby though accepted at one point of time for resolving the dispute by an Arbitrator now he wants this long procedure so that he may retain this money of the plaintiff. From

all the corners it is given out that other forums available for redressal of dispute are to be adhered to to reduce the pendency of cases in the courts and one of this remedy and measure is to resolve the dispute through an Arbitrator. Here what the defendant petitioner itself wanted to resolve the dispute through Arbitrator but now at this stage it is backing out from it to the extent where another ten years may be taken by the court to decide the suit. It is wholly a malafide approach of the defendant petitioner. It is a case where on technical plea it wants to take the benefit of the situation i.e. the mistake of the court or the plaintiff but the court has to see that substantial justice is advanced to the parties and merely for mistake of the court, the litigant may not suffer, it has rightly not permitted the course which is suggested by the petitioner.

7. Then there is yet another point from which it is clear that how dishonestly the defendant - petitioner has come up in the court. In reply, a plea has been taken that the suit has already been stayed and therefore, no further order in this suit can be passed, meaning thereby, he wants that the suit may remain under stay. Then it is stated that the the plaintiff has not filed any application under the provisions of the Act and has never demanded for appointment of Arbitrator and the suit can not be referred to the Arbitrator. This is wholly a malafide approach of the defendant and backing out from his own commitment of resolving this dispute by arbitration. In his application Ex.34 of the Arbitration Act, 1940, the defendant - petitioner had stated :

(4) The said arbitration clause covers the disputes raised by the plaintiff in the present suit hence the same require to be resolved through Arbitration as agreed by the parties.

(5) The defendants submit that they hae claims agisnt the plaintiff and are prepared to submit the same to Arbitration.

(6) The defendants are ready and willing to refer the disputes to Arbitration. Even in the past disputes were settled by negotiations. The defendants also declare that they will fully co-operate in the Arbitration proceedings.

(7) The defendant is taking steps to move an application under the Indian Arbitration Act in

the High Court at Delhi.

8. From the aforesaid contents of the application of the defendant - petitioner it is clear that the defendant has stated that he is taking the steps to move an application under Indian Arbitration Act in the High Court at Delhi but he got this suit stayed in the trial court and as per his own commitment he has not moved any application in the High Court of Delhi also. So both ways the defendant is getting the benefit out of this situation and at this stage the lapse with remained in the proceedings is sought to be corrected, it has come up with all these objections. It is true technically there may be some substance in the contention of the learned counsel for the petitioner re: repealing of Arbitration Act, 1940 and coming into force new Act but the substance of the matter has to be considered and where the proceedings of the suit have been stayed under section 34 way back in the year 1995 and Arbitrator was not appointed for the mistake of the court or the plaintiff, this is appropriate stage where the party approaches the court and the court has taken the view in consonance with advancement of substantial justice.

9. This court is sitting under section 115, C.P.C. and even if the case of the petitioner falls under any of the clauses (a) (b) and (c) of subsection (1) of section 115, C.P.C. still it may decline to interfere with the order impugned in this civil revision application where it is satisfied that in case the impugned order is allowed to stand it will not occasion any failure of justice or will cause any irreparable injury to the petitioner. Here I fail to see in case the order of the learned trial court is allowed to stand how it will occasion any failure of justice or will cause any irreparable injury to the petitioner who himself was desirous of resolving the dispute through arbitration. Each case has to be decided on its own facts and reliance which has been placed by the learned counsel for the petitioner on the decision of the Karnataka High Court is of little help to him in this case. There should have been endeavour by the courts to see that substantial justice is done to the parties concerned.

10. In view of these facts and circumstances of the case, I do not consider it to be appropriate to decide all the contentions raised by the learned counsel for the petitioner.

11. In the result, this civil revision application

fails and the same is dismissed. Rule discharged. The petitioner is directed to pay Rs.1000/- as costs of this revision application to the plaintiff - respondent.

The judgment is separately pronounced today in M.C.A. No.2670/99, which may be read as part of this judgment also.

(S.K. Keshote,J)

zgs/-